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Nos. 07-1601 and 07-1607

In the Supreme Court of the United States

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

SHELL OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
AARON P. AVILA
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the district court's determination that petitioner Shell Oil Company is liable under Section 107(a)(3), 42 U.S.C. 9607(a)(3), of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, as an entity that "arranged for disposal" of hazardous substances.

2. Whether the court of appeals properly held petitioners jointly and severally liable under CERCLA for the response costs of the United States and California governments, based on the court's conclusion that petitioners did not satisfy their evidentiary burden of providing a reasonable basis to apportion liability.

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In the Supreme Court of the United States

No. 07-1601

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OPINIONS BELOW

The second amended opinion of the court of appeals (Pet. App. 1a-57a) is reported at 520 F.3d 918.[1] The first amended opinion of the court of appeals (Pet. App. 263a-310a) is reported at 502 F.3d 781. The initial opinion of the court of appeals is reported at 479 F.3d 1113. The

[1] Unless otherwise noted, all references to the "Pet. App." are to the appendix in the petition for a writ of certiorari in No. 07-1601.

amended opinion and order of the district court (Pet. App. 82a-262a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2007. The petitions for rehearing were denied on March 25, 2008 (Pet. App. 3a). The petitions for a writ of certiorari were filed on June 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the United States to protect the public and the environment from the harm caused by the release or threat of release of hazardous substances into the environment. CERCLA also establishes a mechanism by which federal and state governments can recover their cleanup expenses from the parties responsible for the contamination.

This case arises from actions taken by the United States and the State of California to address hazardous-substance contamination at a former agricultural chemical storage and distribution facility located in Arvin, California. The governments brought a cost-recovery action against petitioners, two railroad companies (the Railroads) and a chemical manufacturer (Shell), under CERCLA Section 107(a), 42 U.S.C. 9607(a). After a bench trial, the district court found the Railroads and Shell to be liable parties under CERCLA, and further found that the Railroads and Shell were liable for nine percent and six percent of the recovery costs, respectively. The court of appeals affirmed in part and reversed in part, holding that Shell was a liable party and

that petitioners were jointly and severally liable. Pet. App. 1a-57a.

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); *Bestfoods*, 524 U.S. at 55-56 & n.1. "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Id.* at 56 n.1 (quoting *Union Gas*, 491 U.S. at 21 (plurality opinion of Brennan, J.)).

The Environmental Protection Agency can clean up hazardous substance sites, either by undertaking remediation itself (see 42 U.S.C. 9604 (2000 & Supp. V 2005)) or by compelling, through an administrative or judicial order, the responsible parties to undertake remediation under government supervision (see 42 U.S.C. 9606(a)). Under either approach, the United States may recover from responsible parties the response costs it incurs through an action under CERCLA Section 107(a). See 42 U.S.C. 9607(a).

To establish a prima facie case under Section 107(a), the United States must show a "release" or "threatened release" of a "hazardous substance" from a "facility" causing the United States to incur cleanup costs. The United States must further establish that the defendant

falls within at least one of the four following classes of responsible persons: (1) the current owner and operator of the facility, (2) the owner or operator of the facility at the time of any disposal of hazardous substances, (3) any person who arranged for disposal or treatment of hazardous substances owned or possessed by such person, and (4) any person who accepts any hazardous substances for transport to disposal or treatment facilities. 42 U.S.C. 9607(a). Subject to limited defenses, responsible parties are strictly liable for "all costs of removal or remedial action incurred" by the United States "not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A) and (b); 40 C.F.R. Pt. 300.

Courts have consistently ruled that, once the United States has established CERCLA liability, the responsible party is jointly and severally liable for the entire amount of response costs regardless of fault unless it proves that the harm from the release of hazardous substances is divisible. See, *e.g.*, *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 721-722 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 268-269 (3d Cir. 1992); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 171-172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). In analyzing divisibility of harm in Section 107(a) actions, courts have followed the Restatement (Second) of Torts (1965) (Restatement) Section 433A, which provides that damages may be apportioned where there are distinct harms or where there is a "reasonable basis for determining the contribution of each

cause to a single harm." See, *e.g.*, *Monsanto*, 858 F.2d at 171-173; *In re Bell Petroleum Servs.*, 3 F.3d 889, 895-897 (5th Cir. 1993); *United States* v. *Township of Brighton*, 153 F.3d 307, 318 (6th Cir. 1998); *United States* v. *Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir.), cert. denied, 534 U.S. 1065 (2001).

Responsible parties facing joint and several liability may also file separate contribution actions, at which point equitable factors may be taken into account, to collect a portion of the costs from other responsible parties. See 42 U.S.C. 9613(f)(1).

2. In 1960, Brown & Bryant, Inc. (B&B) started operating an agricultural chemical storage and distribution business on a 3.8-acre parcel, which it initially leased and subsequently purchased (the B&B parcel). Pet. App. 12a. In 1975, B&B expanded its operations by leasing a 0.9-acre parcel owned by the Railroads that adjoined the B&B parcel to the west (the Railroad parcel). *Ibid.* The Railroad parcel, like the rest of the facility, was graded toward a drainage pond on the B&B parcel. *Ibid.* B&B ceased operating the facility in 1988 and is now insolvent. *Id.* at 129a.

Among the products stored and distributed at the facility were D-D and Nemagon, both manufactured by Shell, constituents of which are hazardous substances. Pet. App. 13a. During their transfer and storage, the chemicals routinely spilled and leaked onto both parcels. *Id.* at 13a-14a, 130a. Over the course of the facility's operation, hazardous substances entered the subsurface, creating a single plume of contaminated groundwater that threatened municipal drinking water supplies. *Id.* at 14a. The California and federal governments began to clean up the contamination at the facility pursuant to

their remediation authority under CERCLA. *Id.* at 14a-15a.

3. In 1996, the United States and the State filed suit under CERCLA Section 107(a) to recover their response costs, naming as defendants B&B, the Railroads, and Shell. In 2003, after a bench trial, the district court issued its Amended Findings of Fact and Conclusions of Law. Pet. App. 82a-262a.

a. The district court held that the governments had established a prima facie case of CERCLA liability. Pet. App. 163a-219a. The court determined that the entire site, encompassing both the B&B and Railroad parcels, constitutes a single "facility." *Id.* at 172a-173a. The court found that site operations released hazardous substances "from and located throughout the facility, particularly in the form of contaminated groundwater," and that the plume "poses an indivisible threat of leaching and diffusing contaminants to lower groundwater suitable for drinking." *Id.* at 172a; see *id.* at 174a.

The district court found that the Railroads were responsible parties as owners of the facility and as owners of the facility at the time of disposal, Section 107(a)(1)-(2), 42 U.S.C. 9607(a)(1)-(2). Pet. App. 176a-179a, 186a-187a. The court rejected the Railroads' third-party defense under CERCLA Section 107(b)(3), 42 U.S.C. 9607(b)(3), finding that the Railroads "periodically inspected B&B's plant and had actual knowledge" of B&B's operations, and that "B&B used the leased parcel to store chemicals where leaks would often occur." Pet. App. 184a-185a; see *id.* at 176a, 178a-179a. The court determined that the Railroads had "submitted no evidence that they took any action to prevent or mitigate their lessee's conduct on the Site, which ignored the hazards of continuous spills, releases and reckless prac-

tices in the unloading, storage, formulating and loading of toxic ag-chemicals." *Id.* at 185a. The court found that the Railroads had "failed to show that they acted with due care" or "took any precautionary actions against the foreseeable results of B&B's activities in storing and handling hazardous ag chemicals on the Railroad parcel." *Ibid.*

The district court held that Shell was liable pursuant to CERCLA Section 107(a)(3), 42 U.S.C. 9607(a)(3), as a party who had "arrange[d] for disposal" of hazardous substances. Pet. App. 204a, 208a-213a. The court determined that Shell "was an active participant in the D-D shipment, delivery and receiving process at Arvin with knowledge that spills and leaks of hazardous D-D were inherent and inevitable," and that such spills and leaks "occurred throughout the period Shell sold D-D to B&B." *Id.* at 204a. The court found that under the "Conditions of Sale," Shell had "determined and arranged for the means and methods of delivery of the D-D to the Arvin plant"; Shell had "hired common carrier delivery trucks to haul D-D to B&B's Arvin plant"; B&B was required to follow the Shell manual which provided "detailed loading and unloading procedures and specified the protective equipment employees had to wear"; Shell had "dictated" that B&B personnel unload the tanker truck; and over one period Shell had "required B&B to store highly corrosive D-D in bulk tanks, at a time when the distributors did not have the equipment or capital to deal with the corrosive D-D." *Id.* at 208a-209a. The court found that D-D spills "were expected and inherent in the delivery and unloading process that Shell arranged," and that "Shell understood this" and knew "that spillage of D-D onto the ground

posed a substantial threat of groundwater contamination." *Id.* at 209a.

b. The district court then addressed whether the Railroads and Shell should be held jointly and severally liable for the governments' response costs. The court recognized that joint and several liability generally applies in a CERCLA cost-recovery action. Pet. App. 232a. The court found that once liability is established, the burden "shifts to the defendant to demonstrate, by a preponderance of the evidence, that there exists a reasonable basis for divisibility." *Id.* at 235a.

The district court found that the harm at the site "is a single harm which consists of contaminated soil at various locations and depths around the Site and one mass (plume) of contaminated groundwater." Pet. App. 245a-246a. As to whether the evidence presented by the Railroads and Shell provided a reasonable basis for determining the contribution of each defendant to a single harm, the court found that:

> Apportionment in this case is exacerbated by defendants' "scorched earth," all-or-nothing approach to liability. Neither acknowledged an iota of responsibility, in the case of Shell, for causing "releases of hazardous substances["], and in the case of the Railroads, that any release of hazardous substance that required response occurred on [the] Railroad parcel throughout the 13 year lease terms. Neither party offered helpful arguments to apportion liability.

Id. at 236a. The court stated that the Railroads and Shell had "effectively abdicated providing any helpful arguments to the court," and that this had "left the court to independently perform the equitable apportionment analysis demanded by the circumstances of the case."

Id. at 236a-237a. The court further found that "no party has specifically documented the relative contributions of contamination from either parcel," *id.* at 248a, and that there is "no evidence to quantify the difference in volume of the releases" from the Railroad and B&B parcels, *id.* at 252a.

The district court nonetheless proceeded to make a divisibility determination based on its own assumptions. The court performed a three-part calculation for the Railroads' "equitable" apportionment. The court calculated the surface area of the Railroad parcel to be 19.1% of the total site surface area and the 13-year duration of the B&B-Railroad lease to be 45% of the site's total 29 years of operation. Pet. App. 247a. The court postulated (without explanation) that Nemagon and dinoseb, which were stored on the Railroad parcel, "contributed to 2/3 of overall Site contamination." *Id.* at 251a. The court then multiplied the three percentages, stating that "if 19% is multiplied by 0.45 (13 years of storage on Railroad parcel use/28 years of B&B operations) and multiplied by 2/3 (dinoseb and Nemagon contamination) the relative figure of 6% is reached." *Id.* at 252a. The court adjusted the Railroads' liability, "[a]llowing for calculation errors up to 50%," to nine percent of the total response costs. *Ibid.*

Similarly, with respect to Shell, the court acknowledged that "Shell did not present evidence how its products' contribution to the contamination at the Arvin facility can be apportioned." Pet. App. 252a. The court nonetheless estimated the amount of D-D spilled during "Shell controlled" deliveries and then the amount of D-D spilled for all other activities. *Id.* at 256a. Dividing the estimated volume spilled during Shell-controlled deliveries by the total estimated volume of D-D spills, the

court held Shell severally liable for 6% of the response costs. *Id.* at 256a-257a.[2]

4. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 1a-57a.

a. The court of appeals affirmed the district court's ruling that Shell is a liable party under CERCLA as one who "arranged for disposal" of hazardous substances. Pet. App. 44a-55a. The court observed that "arranger" liability extends not only to direct arrangements for disposal of hazardous substances, but also to arrangements in which such disposal is a foreseeable byproduct of (but not the purpose of) the transaction. *Id.* at 48a-50a. The court also noted that CERCLA's definition of "disposal" includes the unintentional processes of "spilling" and "leaking." *Id.* at 50a-51a.

The court then recounted the evidence supporting "arranger" liability here:

> (1) Spills occurred *every time* the deliveries were made; (2) Shell arranged for delivery and chose the common carrier that transported its product to the Arvin site; (3) Shell changed its delivery process so as to require the use of large storage tanks, thus necessitating the transfer of large quantities of chemicals and causing leakage from corrosion of the large steel tanks; (4) Shell provided a rebate for improvements in B & B's bulk handling and safety facilities and required an inspection by a qualified engineer; (5) Shell regularly would reduce the purchase price

[2] The district court made a $1.3 million adjustment to Shell's several liability because the governments had incurred response costs in connection with a "hot spot" at the site contaminated with dinoseb. Because dinoseb was not a Shell product, the court found the hot spot to be a separate harm for which Shell was not liable. Pet. App. 253a.

of the D-D, in an amount the district court concluded was linked to loss from leakage; and (6) Shell distributed a manual and created a checklist of the manual requirements, to ensure that D-D tanks were being operated in accordance with Shell's safety instructions.

Pet. App. 53a-54a. The court held that the district court's findings "demonstrate that Shell had sufficient control over, and knowledge of, the transfer process to be considered an 'arranger,' within the meaning of CERCLA, for the disposal of the chemicals that leaked." *Id.* at 55a.[3]

b. The court of appeals reversed the district court's determination of divisibility and held petitioners jointly and severally liable. Pet. App. 19a-47a.

The court began by setting forth the legal standards for apportionment under CERCLA, expressly joining all other courts of appeals that have addressed the subject on three critical issues. First, the court explained that, while liability under CERCLA is generally joint and several, apportionment is available at the liability stage under appropriate circumstances. Pet. App. 19a-22a. Second, the court relied on the apportionment analysis of Restatement Section 433A, which provides that damages may be apportioned where there are distinct harms or where there is a "reasonable basis for determining the *contribution of each cause* to a single harm." Pet. App. 22a-26a (quoting Restatement § 433A). Third, the court held that equitable considerations are not appropriate for purposes of apportioning liability among responsible parties at the liability stage. *Id.* at 30a-34a.

[3] The Railroads did not appeal the district court's finding that they were liable as responsible parties.

The court of appeals then turned to the applicable standard of review. It held that whether the harm at issue is theoretically capable of apportionment is a question of law reviewed de novo, but that whether the defendant submitted evidence sufficient to establish a reasonable basis for the apportionment as well as the district court's actual apportionment were questions subject to review for clear error only. Pet. App. 35a-36a. The court also held that the burden of proof is on the party seeking to apportion liability. *Id.* at 36a.

The court of appeals then applied those standards to this case. With respect to the Railroads, it held that the district court's apportionment calculation (based solely on percentage of land area, duration of ownership, and leakage volumes) lacked a reasonable basis in the record.[4] Pet. App. 37a-44a. The court concluded that "although most of the numbers the district court used were sufficiently exact, they bore insufficient logical connection to the pertinent question: What part of the contaminants found on the Arvin parcel were attributable to the presence of toxic substances or to activities on the Railroad parcel?" *Id.* at 43a.

With respect to Shell, the court of appeals held that the evidence produced at trial was insufficient to formulate even a rough approximation of Shell's proportional share of the site contamination. Pet. App. 44a-45a. The court found that the leakage evidence in the record did not provide a reasonable basis to sustain the district court's analysis because the site was contaminated with

[4] The court of appeals also held that the district court had committed a basic factual error when it assigned a two-thirds fraction to represent the types of hazardous substances on the Railroad parcel because all three chemicals were on the Railroad parcel at some time. Pet. App. 42a.

a number of chemicals, and because Shell had failed to introduce any evidence from which a court could identify the percentage of the soil contamination that was attributable to its leaked chemicals.[5] *Ibid.* As the court put it, the record lacked that evidence "most likely because Shell put its eggs in the no-liability basket." *Id.* at 47a.

The court of appeals therefore held that the Railroads and Shell were jointly and severally liable for the harm at the site (except for the dinoseb hotspot, for which Shell was not liable, see note 2, *supra*). Pet. App. 56a-57a. The court of appeals denied rehearing en banc, over a dissenting opinion. *Id.* at 3a, 57a-81a.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court, and does not create a conflict among the courts of appeals. Nor is this case a proper vehicle for the Court to address any circuit conflict that may already exist. Accordingly, the Court's review is not warranted.

1. Shell argues (07-1607 Pet. 15-21) that it should not be liable under CERCLA at all because it did not "arrange for disposal" of a hazardous substance.[6] The court of appeals correctly affirmed the district court's contrary determination, and that fact-based determination does not warrant this Court's review.

[5] The court of appeals also held that the district court's calculations even for the leakage of Shell chemicals at the site was far too speculative to provide a basis for apportioning liability. Pet. App. 45a-46a.

[6] The Railroads also urge (07-1601 Pet. 19) this Court to grant Shell's petition for a writ of certiorari as to Shell's "arranger" liability. In the court of appeals, however, the Railroads argued for *affirmance* of the district court's ruling that Shell is liable as an arranger. See Railroads Second C.A. Br. 16-38.

There is no bright-line rule for determining arranger liability. Rather, the relevant inquiry is whether the fact finder could infer from all the circumstances that a transaction involves an arrangement for the disposal or treatment of a hazardous substance. The courts of appeals are "virtually unanimous" that (1) determining arranger liability is a fact-intensive inquiry requiring consideration of all the circumstances, and (2) courts must look behind a defendant's characterization of the transaction to determine whether, in fact, the transaction involved an arrangement for disposal or treatment of a hazardous substance. *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 677 (3d Cir. 2003); see *Geraghty & Miller, Inc.* v. *Conoco Inc.*, 234 F.3d 917, 929 (5th Cir. 2000) (no bright-line test for determining when one is an "arranger"; court must examine "totality of the circumstances"), cert. denied, 533 U.S. 950 (2001); *Freeman* v. *Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999) (courts have uniformly held that liability cannot be avoided by characterizing arrangement as a sale, and that arranger liability depends on the facts of each case); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 775 (4th Cir.) (courts examine a number of factors to determine if a transaction was a sale or disposal for purposes of arranger liability), cert. denied, 525 U.S. 963 (1998); *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231-1232 (6th Cir. 1996) (court must inquire into what actually transpired between the parties); *South Fla. Water Mgmt. Dist.* v. *Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996) ("[w]hen determining whether a party has 'arranged for' the disposal of a hazardous substance, courts must focus on all of the facts in a particular case"); *Cadillac Fairview/Cal., Inc.* v. *United States*, 41 F.3d 562, 566 (9th

Cir. 1994) (courts will address on a case-by-case basis whether "in light of all the circumstances the transaction involved an arrangement for disposal or treatment of a hazardous waste"); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1381-1382 (8th Cir. 1989) ("courts have not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance").

Shell does not dispute those propositions. Indeed, Shell acknowledges (07-1607 Pet. 20 n.2) that "arranger liability under 42 U.S.C. § 9607(a)(3) may extend beyond traditional 'direct arranger' liability for transactions entered into solely for the purpose of disposing of hazardous waste." Nor can Shell dispute that "disposal," as defined in CERCLA, includes the unintentional acts of spilling and leaking. See 42 U.S.C. 6903(3), 9601(29). Instead, Shell asserts (07-1607 Pet. 15) that the court of appeals' decision "for the first time" finds a chemical manufacturer liable as an arranger "merely" for shipping a useful product, by common carrier, to a purchaser that in turn allowed that product to leak or spill upon the ground after acquiring ownership and actual control. Shell's characterization of the record in this case belies the amount of involvement and control exercised by Shell, as well as Shell's knowledge of the disposals that were occurring at the facility when the chemicals were delivered by Shell's transporter.

As the court of appeals explained, Shell was "deeply involved" in the delivery process. Pet. App. 13a n.5. Shell contractually reserved the exclusive authority to, and in fact did, arrange for the delivery of hazardous D-D by common carrier tanker trucks to the facility. *Id.* at 124a. Shell owned the D-D at the time of such ar-

rangement. *Id.* at 211a. The common carriers were paid directly by Shell, participated in the transfer process, and used equipment required by Shell. Shell C.A. Supp. E.R. 113-114. At one point, Shell changed the delivery process so as to require the use of large storage tanks by purchasers, thus necessitating the transfer of hazardous substances and resulting in leakage from storage tanks. Pet. App. 53a, 114a-115a, 209a.

The record also is replete with evidence that spills of D-D were inherent and inevitable in the delivery process that Shell arranged, and that Shell was aware of that fact. Trial testimony established that spills of Shell D-D were an expected and routine part of the delivery process, especially during transfer of the product conducted by the Shell-hired drivers. Pet. App. 211a; Shell C.A. Supp. E.R. 9, 15-16, 113-116, 122-123. A Shell 1986 Marketing Agreement with B&B also recognized that spillage occurred during delivery of bulk liquid. That document stated in a section entitled "Shrinkage" that "[s]ingle and multiple destination deliveries by common carrier will be allowed 0.5 percent on a weight basis for shrinkage that may occur at time of unloading," and that the "shrinkage allowance will be deducted off the billing invoice." Gov't C.A. Supp. E.R. 962. In other words, "there was a monetary allowance to B&B for product Shell expected to be lost in the process of delivery and storage." Pet. App. 122a. As the district court held, D-D spills "were expected and inherent in the delivery and unloading process that Shell arranged," and "Shell understood this" and knew "that spillage of D-D onto

the ground posed a substantial threat of groundwater contamination." *Id.* at 209a.[7]

Those key facts found by the district court and affirmed by the court of appeals easily distinguish this case from the several cases cited by Shell (07-1607 Pet. 18-19) involving the mere sale of useful products, absent control or knowledge of disposal on the part of the manufacturer. Compare, *e.g.*, *Freeman*, 189 F.3d at 16 (no arranger liability because "[t]here is no evidence in the record before us to support an inference that the transaction at issue was anything more than a sale."), with *Aceto*, 872 F.2d at 1382 (denying arranger liability where disposals were inherent to the transaction "would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA").

In *Amcast Industrial Corp.* v. *Detrex Corp.*, 2 F.3d 746, 751 (1993), cert. denied, 510 U.S. 1044 (1994), the case upon which Shell most heavily relies, the Seventh Circuit held that a manufacturer was not liable as an arranger for spills that occurred during a common carrier's delivery of hazardous substances to the customer. But there is no suggestion in that decision that the manufacturer exercised any control over those deliveries other than hiring the carrier, let alone the extent of control found to have been exercised by Shell here. Nor is

[7] For the same reasons, the United States disagrees with the characterization of Shell's involvement at the facility set forth in the dissent from the denial of rehearing en banc in this case. The dissent's description is contrary to the findings of the district court, affirmed by the panel. As discussed, Shell was significantly more than a "mere seller" who "relinquished control over its products upon delivery and before spillage occurred." Pet. App. 61a. In any event, such a factual dispute does not warrant this Court's review.

there any suggestion that the manufacturer, like Shell, was aware that disposals (in the form of spills and leakage) of hazardous substances were occurring as a routine part of the carrier's delivery process. For example, unlike here, there is no indication that the manufacturer in *Amcast* arranged for a price reduction to account for the spillage of product that occurred during delivery. The degree of the manufacturer's control and knowledge of the delivery and disposal of hazardous substances, therefore, differ markedly between this case and *Amcast*.

Nor is this a situation where a manufacturer of a useful product is being held liable solely on the theory that there will have to be disposal at some later time, after the product has served its useful purpose. See *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990); *AM Int'l, Inc.* v. *International Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993). As the court of appeals explained (Pet. App. 52a-53a), that line of cases is not implicated here, where the relevant disposal occurs *before* the use. In sum, all of the cases on which Shell relies for a supposed circuit conflict arise in very different factual scenarios. The court of appeals' decision here premised on Shell's control over the deliveries and Shell's knowledge of disposals during those deliveries is not inconsistent with those decisions, let alone in direct conflict.[8]

2. Petitioners contend (07-1601 Pet. 20-23, 26-30; 07-1607 Pet. 21-25) that the court of appeals applied agreed-upon principles too narrowly in finding no reasonable basis to apportion CERCLA liability on the

[8] Shell's further assertion (07-1607 Pet. 19) of an intra-circuit conflict provides no basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

facts of this case. Petitioners' contention is in essence a request to revisit the court of appeals' factbound application of the same legal standard that petitioners would apply. Because the court of appeals' decision does not turn on any issue on which the circuits disagree, this Court's review is not warranted.

a. Crucially, petitioners do not dispute the correctness of the court of appeals' articulation of the substantive legal standards governing apportionment in the CERCLA context. First, consistent with all other courts of appeals to have addressed the issue, the Ninth Circuit stated that while liability under CERCLA is generally joint and several, apportionment is available at the liability stage under appropriate circumstances. Pet. App. 19a-22a. Second, consistent with all other courts of appeals to have addressed the issue, the Ninth Circuit stated that apportionment analysis starts with Section 433A of the Restatement, which provides that damages may be apportioned where "there are distinct harms" or "there is a reasonable basis for determining the contribution of each cause to a single harm." Pet. App. 22a-26a. Third, consistent with all other courts of appeals to have addressed the issue, the Ninth Circuit stated that equitable considerations while relevant for contribution actions under 42 U.S.C. 9613(f)(1) are not appropriate for purposes of apportioning liability among responsible parties. Pet. App. 30a-34a. Fourth, again consistent with all other courts of appeals to have addressed the issue, the Ninth Circuit stated that the responsible parties have the burden of proving a reasonable basis for divisibility. *Id.* at 36a.

Petitioners do not and cannot allege any circuit conflict on those legal questions, nor do they object to the court of appeals' articulation of those governing legal

principles. Instead, petitioners quibble principally with the court of appeals' *application* of those accepted legal standards to the facts of this case. Notably, the record below was significantly shaped by petitioners' own tactical choices. Rather than attempting to prove divisibility, petitioners' trial strategy was to argue that they were not liable at all. As a result, the district court was confronted with a situation where petitioners had failed to articulate, much less substantiate, any specific rationale for divisibility. See Pet. App. 236a ("Apportionment in this case is exacerbated by defendants' 'scorched earth,' all-or-nothing approach to liability. * * * Neither party offered helpful arguments to apportion liability."). On that record, the court of appeals narrowly and correctly held that petitioners had failed to provide a reasonable basis for divisibility and that the district court had clearly erred in finding otherwise. In any event, the court of appeals' fact-based determination does not warrant this Court's review.

b. In an effort to create the appearance that the Ninth Circuit's factbound decision conflicts with the decisions of other courts of appeals, petitioners speculate (07-1601 Pet. 26-30; 07-1607 Pet. 22-25) that other courts —though applying the same substantive legal standards applied by the Ninth Circuit here would have found a reasonable basis to apportion liability based on the record in this case. Toward that end, petitioners argue (07-1601 Pet. 20-26) that the court of appeals incorrectly applied the Restatement's divisibility principles. Even if that were true, such misapplication would not warrant this Court's review. In any event, the court of appeals correctly applied Restatement principles to apportionment under CERCLA on the record before it.

Under Restatement Section 433A(1)(b), in relevant part, there must be "a reasonable basis for determining the contribution of each cause to a single harm." "[R]easonable basis" does not mean any basis a court can cobble together. There must be "sufficient *evidence* from which the court can determine the amount of harm caused by each defendant. If the *expert testimony and other evidence* establishes a factual basis for making a reasonable estimate that will fairly apportion liability, joint and several liability should not be imposed in the absence of exceptional circumstances." *In re Bell Petroleum*, 3 F.3d 889, 903 (5th Cir. 1993) (emphasis added); *United States* v. *Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir.) ("Evidence supporting divisibility must be concrete and specific."), cert. denied, 534 U.S. 1065 (2001); *Chem-Nuclear Sys., Inc.* v. *Bush*, 292 F.3d at 254, 260 (D.C. Cir. 2002) (chain of possible inferences insufficient to carry liable party's burden). Here, the divisibility theory the district court invented lacked sufficient evidentiary support to establish it as a reasonable basis for determining the harm each petitioner caused.

That is not to say, as the court of appeals explicitly recognized (Pet. App. 24a n.18, 39a n.29), that volumetric, chronological, geographic, or other considerations can *never* establish divisibility. Those considerations, however, must be supported by evidence establishing them as a reasonable basis of apportionment, and the party claiming divisibility bears the burden of proving the basis for any apportionment. The Railroads might have submitted evidence at trial establishing that geographic area and time of ownership at the site was a reasonable basis for determining the amount of harm caused by the Railroads, but they did not. And Shell might have submitted evidence as to why the volumetric

ratio of leakage of *its* chemicals at the site was a reasonable basis for determining the relative amount of harm Shell caused, but it did not. Petitioners did not introduce evidence, through expert testimony or otherwise, to establish that divisibility based on area owned, period of ownership, or leakage volume was a reasonable basis for apportionment. Given that record, the court of appeals did not err. See *id.* at 47a, 236a.[9]

Petitioners (07-1601 Pet. 2-3) state that the court of appeals "acknowledged a direct conflict with the Fifth Circuit's decision in *Bell Petroleum Services*, 3 F.3d at 904 & n.19, which permits apportionment on the basis of reasonable assumptions even if records are 'incomplete,'

[9] For similar reasons, petitioners' reliance (07-1601 Pet. 20-21; 07-1607 Pet. 22, 25) on the Restatement's cattle example is misplaced. In that example, where the cattle of two or more owners trespass on someone else's property and cause crop loss, the Restatement suggests that aggregate harm can be apportioned on the basis of the number of cattle owned by each and the assumption that the relative harm caused by each owner is proportionate to that number. Restatement § 433A cmt. d. That analogy is inapt given the greater complexities of the site and the harms at issue in this case. The causation analysis here involves considerably more variables (*e.g.*, multiple hazardous substances, pollution over time, different activities) than the cattle example, and, as noted above, petitioners did not proffer sufficient evidence as to the relative effect of those variables to justify the district court's blanket assumptions.

Even if the cattle example were relevant, it would not help petitioners. Petitioners' critical problem is that they never established how many cows each farmer had in the field or even what proportion of the cows were the Railroads' or Shell's. Petitioners at trial argued, in essence, that they had no cows at all. As the district court found, the Railroads presented "no evidence to quantify the difference in volume of the releases" on the B&B and Railroad parcels, and "Shell did not present evidence how its products' contribution to the contamination at the Arvin facility can be apportioned." Pet. App. 252a.

so long as a factual basis exists for a 'rough approximation' of each defendant's causal responsibility for the harm." Contrary to petitioners' assertion, the Ninth Circuit explicitly avoided that potential conflict by holding that, given the absence of a logical basis for the district court's inferences, its decision would be the same even under the Fifth Circuit's more forgiving standard. Pet. App. 46a n.32. For that reason, the court of appeals declined to express a view as to the level of specificity of proof needed to establish divisibility under CERCLA. *Ibid.* Indeed, the court of appeals elsewhere "emphasize[d] that [its] conclusion does not rest simply on the fact that the district court's calculation of the Railroads' share of liability was, as the court recognized, 'rough[].' It is neither unusual nor fatal to the validity of the resulting allocation that an apportionment determination includes estimates of contribution to contamination based on extrapolation of record facts, as long as the basis for the extrapolation is explained, is logical, and does not disregard other record facts." *Id.* at 38a n.28.[10]

Notably, petitioners do not cite a single case in which a court of appeals has affirmed apportionment of CERCLA liability under facts similar to those at issue here. Indeed, though discussed by the Ninth Circuit (Pet. App. 38a-39a), petitioners do not even mention *United States* v. *Rohm & Haas Co.*, 2 F.3d 1265 (3d Cir. 1993),

[10] In any event, the assumptions at issue in *Bell Petroleum* were *assumptions by experts* in formulating their opinions that would then be used as evidence for divisibility. 3 F.3d at 904. Here, the assumptions were made by the district court without an evidentiary basis. Moreover, in *Bell Petroleum*, unlike here, only one hazardous substance (chromium) was involved, and the chromium entered the groundwater "as the result of similar operations by three parties who operated at mutually exclusive times." *Id.* at 903.

overruled on other grounds by *United States* v. *E.I. DuPont De Nemours & Co.*, 432 F.3d 161, 162-163 (3d Cir. 2005) (en banc) the most factually analogous court of appeals decision to have addressed apportionment of CERCLA liability (and perhaps the only other one to have analyzed apportionment of *landowner* liability). In *Rohm & Haas Co.*, the Third Circuit held a responsible party that owned only 10% of the land area of the facility at issue to be jointly and severally liable. 2 F.3d at 1280-1281. In doing so, the Third Circuit rejected the party's request for apportionment based on its percentage of ownership, because "[t]he fact that [defendant] only owns a portion of the site says nothing about what portion of the harm may fairly be attributed to it." *Id.* at 1280. The Third Circuit also rejected apportionment based on temporal factors (namely, that most, if not all, of the waste was disposed of prior to its ownership), reasoning that the party "did not prove that none of the harm was attributable to it." *Ibid.* That the Ninth Circuit reached the same conclusion as the Third Circuit on similar facts further demonstrates the absence of any meaningful conflict.

c. Petitioners' last attempt (07-1601 Pet. 30-31) at identifying a circuit conflict relates to the standard of review applicable to a district court's divisibility determinations. In the Fifth and Eighth Circuits, whether the harm is capable of apportionment among two or more causes is a question of law reviewed de novo, while the actual apportionment of damages is a question of fact reviewed for clear error. *Hercules*, 247 F.3d at 718; *Bell Petroleum*, 3 F.3d at 896; Pet. App. 35a-36a; accord Restatement § 434 (functions of court and jury). The Sixth Circuit has stated simply that it will affirm a "district court's determination of indivisibility unless it is

clearly erroneous." *United States* v. *Township of Brighton*, 153 F.3d 307, 317-318 (1998).

As an initial matter, it is not clear that any circuit split exists in practice. Shell argued in the court of appeals that the Sixth Circuit applied "essentially the two step decision process described in the Restatement and applied in *Bell Petroleum*." Shell Second C.A. Br. 13 n.4 (citing *Township of Brighton*, 153 F.3d at 319-320).[11]

In any event, this case is not a proper vehicle to resolve any conflict that may exist. At most, the potential split as to the proper standard of review applies only to the threshold question of whether the harm is capable of apportionment. But the court of appeals in this case (applying de novo review) *agreed* with the district court that the harm here was capable of apportionment—a conclusion that petitioners endorse. See Pet. App. 36a-37a. And on the subsequent question of whether the record in this case provided a reasonable basis for the district court's apportionment, the court of appeals reviewed for clear error. *Ibid.* That is precisely the standard of review that petitioners now seek. 07-1601 Pet. 31. Accordingly, resolution of the alleged circuit conflict would not benefit petitioners. To be sure, petitioners disagree with the court of appeals' application of the clearly erroneous standard in this case, but, as explained above, that factbound issue does not warrant the Court's review.

d. Contrary to petitioners' contention (07-1601 Pet. 23-24), the court of appeals' decision does not evidence

[11] Shell's argument below also suggests that it has waived the issue. Similarly, the Railroads asserted in the court of appeals that "[w]hether there is sufficient evidence to permit the trier of fact to apportion harm also is a question of law." Railroads First C.A. Br. 26 (citing Restatement § 434).

any undue bias in favor of joint and several liability under CERCLA. In particular, the Railroads complain (*id.* at 07-1601 Pet. 23) that they are being held liable for contamination not occurring on their land. But CERCLA Section 107(a)(1)-(2), 42 U.S.C. 9607(a)(1)-(2), makes the owner of a "facility" liable for the government's remediation costs, and here the district court found that the Railroad parcel and the B&B parcel constituted a single facility.[12] To be sure, the Railroads argued in the district court that the Railroad parcel should be considered its own facility separate from the B&B parcel. The district court rejected that contention, however, and the Railroads did not appeal on that issue. Pet. App. 165a-173a.

More broadly, the court's analysis is faithful to the language of CERCLA, Congress's purpose in enacting the statute, and relevant case law. CERCLA provides that the parties specified in 42 U.S.C. 9607(a) (subject to the statutory defenses) are strictly liable for "all" response costs incurred by the United States not inconsistent with the national contingency plan. "CERCLA's broad, remedial purpose is to facilitate the prompt cleanup of hazardous waste sites and to shift the cost of environmental response from the taxpayers to the parties who benefitted from the wastes that caused the harm." *OHM Remediation Servs.* v. *Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997); see H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 15 (1985) ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if

[12] Congress defined "facility" in CERCLA to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. 9601(9).

such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").

Importantly, where a responsible party is held jointly and severally liable but believes it has paid more than its fair share, CERCLA provides recourse: that party can pursue a contribution action against other responsible parties to collect a portion of the costs. See 42 U.S.C. 9613(f). "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Ibid.* In contrast, as the court of appeals recognized consistent with all other circuits to have addressed the issue but contrary to the district court's approach cquitable considerations should not be taken into account during apportionment at the liability stage. See Pet. App. 33a (citing *Hercules*, 247 F.3d at 718; *Township of Brighton*, 153 F.3d at 318; *Bell Petroleum*, 3 F.3d at 901; *Rohm & Haas Co.*, 2 F.3d at 1280-1281). While Section 9613(f) may not be an effective alternative in all situations, such as where the other responsible parties are insolvent, it reflects Congress's considered, compromise response to fairness concerns.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
RONALD J. TENPAS
Assistant Attorney General
AARON P. AVILA
Attorney

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